United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

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UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

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P/S

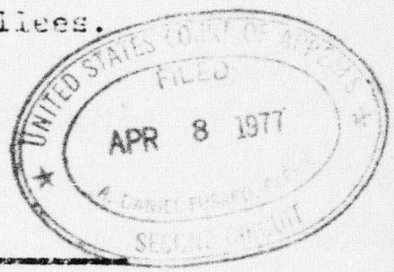
STEVEN PAUL KESSLER,

Plaintiff-Appellant,

- against-

LAWRENCE A. WIEN, ALVIN S. LANE,
FRED LINDEN, ALVIN SILVERMAN,
250 WEST 57th STREET ASSOCIATES,
PETER L. MALKIN, HARRY B. HELMSLEY,
IRVING SCHNEIDER, FISK BUILDING
ASSOCIATES and WIEN, LANE & MALKIN,

Defendants-Appellees.



Appeal from the United States District Court
for the Southern District of New York

BRIEF FOR APPELLEES

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ISSUES PRESENTED

1. Is the interlocutory order of the district court denying class action certification appealable?

2. Did the district court abuse its discretion in finding that appellant had not shown that he was an adequate class representative or that his claims were typical of those of the class he purported to represent?

PRELIMINARY STATEMENT

This is an appeal from an order of the United States District Court for the Southern District of New York (Hon. Richard Owen, J.) denying appellant's motion for class action certification. Although he and other members of the purported class clearly have stakes large enough to warrant pursuing this litigation individually, appellant seeks interlocutory review of the court's finding that he had failed to meet the requirements of Rule 23(a), Fed. R. Civ. P.

At issue is (a) whether the district court's order is appealable and (b) if it is, whether Judge Owen abused his discretion in finding that appellant had not met his burden of showing that he was an adequate class representative and that he presented claims "typical" of those of the alleged class, as required by Rule 23(a)(3) and (4) of the Federal Rules of Civil Procedure. In his brief, appellant ignores both the threshold

question of appealability and his own burden of proof, arguing instead a general proposition of law that is not in dispute. We do not dispute that, in an appropriate case, a loser in a proxy contest may bring suit on behalf of those who voted the other way. But appellant, failing to deal with the very real antagonism between his own litigation objectives and the financial interests of the class, has not demonstrated that this is such an appropriate case -- that is, he has not met his burden of proof under Rule 23(a).

STATEMENT OF THE CASE

This action arises out of defendants' efforts to rescue a commercial office building venture from financial ruin through a plan of refinancing and lease renegotiation.

Appellant, by terms of a "Participating Agreement" (an exemplar of which appears as Exhibit E to the May 22, 1975 affidavit of Lawrence Wien; A. 81-86), is the owner of a $10,000 interest in the venture, 250 W. 57th Street Associates ("Associates"), which is a defendant in this action. Associates is the fee owner of an office building located at 250 W. 57th Street and known as the Fisk Building. The building is operated by defendant Fisk Building Associates ("FBA") under terms of a net lease from Associates.

As appears more fully in the May 22, 1975 affidavit of Lawrence Wien, A. 21-38 ("Wien Aff."), Associates was formed for the express purpose of acquiring title to the Fisk Building and leasing it to FBA (Wien Aff., ¶3; A. 22). In July, 1953, by prospectus duly filed with the Securities and Exchange Commission as part of a registration statement, the venturers in Associates offered 710 participating units of $5,000 each in the venture (Wien Aff., ¶5; A. 23). Appellant's father purchased two of the $5,000 units in 1953 (Wien Aff., ¶13; A. 28) and conveyed them to appellant by written assignment in 1963 (Wien Aff., ¶14; A. 28-29). By terms of the participating agreements, the participants are entitled to share in profits and losses arising from the ownership of the Fisk Building, and to vote on the terms of any mortgage or lease of the building (Wien Aff., ¶13; A. 28).

The venture operated profitably for more than two decades, returning to each participant $28,000 per $10,000 original investment (Wien Aff., ¶27; A. 37). However, as a result of the depressed economy and the poor office building rental market in New York in the early 1970's, FBA began losing substantial sums of money in the operation of the building. Precisely in order to permit FBA to relieve itself of such continuing losses, the lease gave FBA the right to terminate on sixty days' notice (Wien Aff., Exh. C, ¶8; A. 58).

Early in 1975, FBA determined to exercise its right to terminate unless some plan could be developed to minimize losses and to raise capital for improvements which were necessary to attract new tenants (Wien Aff. ¶18; A. 30-31). At the same time, it was necessary to refinance the first mortgage loan on the building, in the amount of $2,978,905, which was due on May 1, 1975 (Id.).

To meet these problems, and to attempt to restore the Fisk Building to profitability, Associates on April 10, 1975 submitted a written proposal to the participants (the "April 10 letter") seeking their consent to a program to refinance the mortgage and renegotiate the lease with FBA (Wien Aff. ¶¶20-21; A. 32-33). The letter clearly stated FBA's intention to exercise its right to terminate the lease, and cease managing the building, if the plan were not approved. Over 88% of the participants (more than 98% of those voting) gave their consent to the plan (Wien Aff. ¶23; A. 34-35).

Appellant commenced this action in April 1975, alleging that the April 10 letter violated the registration, anti-fraud and proxy solicitation provisions of the federal securities laws (15 U.S.C. §§77e, 77g, 78j and 78n) and asserting pendent state and common law claims.

The amended complaint, filed May 15, 1975, sought preliminary and permanent injunctive relief to bar or rescind

the mortgage refinancing and lease modification, as well as damages in an indeterminate amount.

Appellant's motion for preliminary injunctive relief was denied from the bench on May 23, 1975. Appellant's federal registration and anti-fraud claims, which rested entirely on the fanciful premise that the April 10 letter constituted an offering of a new security, were subsequently dismissed (Mem. and Order, May 13, 1976; A. 167-78). Although the district court declined to dismiss outright the alleged proxy rule violations contained in Count 6 of the amended complaint, which are now the only basis for federal jurisdiction, the district court was sharply critical of those claims (Id. at 10-12; A. 176-78). As Judge Owen noted, the proxy rule allegations, "although impressive in their number . . . are distinctly less imposing in substance." (Mem. and Order, May 13, 1976, p. 10; A. 176.) Analyzing the record in detail, the court found that "plaintiff has not offered any significant support for his allegations." (Id. at p. 12; A. 178.)

Appellant's fundamental claim of proxy rule violations is that the April 10 letter failed to disclose the existence of what appellant regards as a conflict of interest among the members of Associates, FBA, and the law firm of Wien, Lane & Malkin. Appellant presses that claim despite the facts that the relationship among the three parties which he claims are in conflict has been fully disclosed to all participants

from the time the original 1953 prospectus was issued, and that the relationship in fact constituted an essential element of the venture and a principal inducement for investors (Affidavit of Harry B. Helmsley, Sep. 10, 1975, ¶3; A. 155). Rather, as Judge Owen noted in his May 13 opinion, appellant really contends that the letter failed to denounce its own proposal as unwise. Judge Owen held that this theory "that the Wien letter condemn the proposal it is offering" affords no basis for appellant's claim (Mem. and Order, p. 10; A. 176). Nevertheless, while rejecting appellant's interpretation of the proxy rules and expressing grave doubts about appellant's likelihood of success, the court permitted the claim to survive to afford appellant an opportunity for discovery.

In June 1976, appellant renewed his motion for class action certification which had been deferred pending a decision on defendants' motion to dismiss the complaint. By memorandum and order of November 16, 1976, the court denied appellant's class action motion. It is this order from which appellant now appeals.

It is clear that the plaintiff has the burden of proof to justify class action certification, Free World Foreign Cars v. Alfa Romeo, 55 F.R.D. 26, 29 (S.D.N.Y. 1972). But the factual record before the court below was simply devoid of any showing of adequacy of representation or typicality of claims required by Rule 23(a) to support class action certification. Rather,

the record contained ample reasons for the court to conclude, in the exercise of its discretion, that appellant was not an adequate or typical representative of the class he purported to represent. For, as Judge Owen recognized, appellant's unique and far-fetched interpretation of the April 10 letter threatens to jeopardize the existence of the entire venture, contrary to the interests of the vast majority of participants.

But this Court need not determine whether Judge Owen abused his discretion under Rule 23, because the order denying class action status is clearly not appealable. As a holder of a $10,000 interest which, appellant claims, will sustain irreparable damage unless the transaction authorized by other participants is set aside, and as a party seeking the remedy of rescission, appellant has an interest in this litigation sufficiently large to maintain it individually. Other participants, with interests as large or larger, can also sue individually, assuming any can be found who share appellant's desire to upset the plan to salvage the Fisk Building venture.

I

THE ORDER DENYING CLASS ACTION CERTIFICATION IS NOT APPEALABLE

Appellant's brief fails to address the question of whether the interlocutory order denying his motion for class certification is appealable to this Court. A review of the

ample authority in this circuit shows conclusively that it is not.

Title 28 of the United States Code, §1291 provides that

> "The Courts of Appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States..." (Emphasis supplied).

As Chief Judge Kaufman has had occasion to observe for this Court, "It is undisputed than an order denying class standing is not a 'final' order as that term has generally been construed." Kohn v. Royall, Koegel & Wells, 496 F.2d 1094 (2d Cir. 1974).

Unless a decision of the district court fully and finally determines an action, that decision cannot be appealed unless a statute, rule of procedure or specific judicial doctrine expressly authorizes it. See generally, 28 U.S.C. §1292; Fed. R. Civ. P. 54(b); 9 J. Moore, Federal Practice, ¶110.06 et seq.

In this case, it is indisputable that the order of the district court left appellant free to pursue his individual claim and his purported appeal is therefore not from a "final decision" as required by 28 U.S.C. §1291. The question before this Court is thus whether this case presents "one of those exceptional instances which compels disregard of the sound policy of finality." Kohn v. Royall, Koegel & Wells, supra, at 1101 (emphasis added).

Although appellant has neglected to specify the jurisdictional basis for his appeal, including in his brief neither a jurisdictional statement nor any supporting argument, he evidently relies upon the so-called "death knell doctrine" first enunciated by this court in Eisen v. Carlisle & Jacquelin, 370 F.2d 119 (2d Cir. 1966), cert. denied, 386 U.S. 1035 (1967). That doctrine permits review of those few orders where appellant demonstrates that denial of class action certification will prevent him from going forward with his action.*

Here, to begin with, appellant has demonstrated nothing to show that the "death knell" has sounded. He has made no showing whatsoever that he is prevented from proceeding with this case in his individual capacity. In the absence of such a showing, he may not appeal, for "the burden is on the named plaintiffs to demonstrate that the death knell is applicable." Hooley v. Red Carpet Corp., [1977-1] Trade Reg. Rep. (CCH) ¶61,275 at p. 70,873 (9th Cir. 1977); Gosa v. Securities Investment Co., 449 F.2d 1330 (5th Cir. 1971).

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* The "death knell doctrine" has not met with universal approval in other circuits, some of which have expressly declined to adopt it in the absence of specific authorization in Title 28 and the Federal Rules of Civil Procedure. See, e.g., King v. Kansas City Southern Industries, Inc., 479 F.2d 1259 (7th Cir. 1973); Hackett v. General Host Corp., 455 F.2d 618 (3d Cir.), cert. denied, 407 U.S. 925 (1972). But regardless of the virtues of the doctrine as a jurisdictional theory, it is clearly inapplicable to the facts of this case.

The burden upon appellant to show that the death knell has sounded is a heavy one. As Judge Mansfield has said in reviewing the standards for appealability of class action orders, "[w]e should not allow this complex, time-consuming and expensive process to be launched without ample justification." General Motors Corp. v. City of New York, 501 F.2d 639, 658 (2d Cir. 1974) (concurring opinion). This Court has specifically cautioned against liberal application of the death knell doctrine, expressing its "lack of enthusiasm for generous appealability of orders refusing class action designation." Korn v. Franchard Corp., 443 F.2d 1301, 1306 (2d Cir. 1971). See also Caceres v. International Air Transport Ass'n., 422 F.2d 141 (2d Cir. 1970). And the Ninth Circuit, which has also adopted the death knell doctrine, has warned that "courts must be strict in making the plaintiff demonstrate that the order complained of truly means the death of his action." Share v. Air Properties G. Inc., 538 F.2d 279, 282 (9th Cir. 1976) (emphasis added).

Nowhere does appellant even attempt to "demonstrate that the order complained of truly means the death of his action", Share, supra. The record is devoid of support for any such contention and, indeed, it shows quite the opposite.

Appellant holds a $10,000 participation interest in Associates (Amd. Cplt. ¶14; A. 11). Since his investment was made, it has earned approximately $28,000, not including any tax

benefits to appellant by virtue of his participation (Wien Aff., ¶27; A. 37). Appellant alleges that, by virtue of the lease modification and mortgage refinancing proposed in the April 10 letter, the principal of his investment will be irreparably damaged, and his earnings will cease.

It is well-established that an interest of this magnitude is sufficient for a plaintiff to maintain an action in his individual capacity. Indeed, this Court has held non-appealable orders denying class action certification where plaintiffs' financial interests were far less than appellant's is here.

In the companion cases of Korn v. Franchard Corp. and Milberg v. Western Pac. Ry. Co., 443 F.2d 1301 (2d Cir. 1971), this Court held that an interest approaching the $10,000 jurisdictional amount of 28 U.S.C. §§1331-32 was sufficient to permit a plaintiff to pursue his case in his individual capacity. Applying this test, this Court permitted the appeal in Korn, where plaintiff sought only $386 in damages, but denied it in Milberg, where plaintiff sought $8,500 in damages arising out of an initial investment of $2,300.

Similarly, in Shayne v. Madison Square Garden Corp., 491 F.2d 397 (2d Cir. 1974), denial of class action certification was held not to be reviewable where plaintiff sought only $7,482 in damages. Cf. Green v. Wolf Corp., 406 F.2d 291 (2d Cir. 1968)

(denial of class certification appealable where individual damages under $1,000).

Whether measured by his principal investment ($10,000) or his income ($28,000 to the date of the commencement of this action), appellant has a monetary interest well in excess of the limits imposed by this Court for appealability of class action orders. Appellant has made absolutely no showing of either his inability or his unwillingness to pursue this suit in his individual capacity.

On the contrary, appellant has himself indicated the importance of his investment to him, and his need for current income from the venture. In the course of argument on his unsuccessful motion for a preliminary injunction, appellant's counsel stressed that "we are in a day and age when this kind of interest of $10,000 is important to the small persons whom we represent." (Transcript of Oral Argument, May 23, 1975, p. 11; A. 121). At least in the absence of any contrary showing, it may be presumed from this representation, and from appellant's willingness to engage counsel and pursue this action for nearly two years without any other named plaintiffs, that appellant will desire to vindicate what he considers to be his damaged rights in a substantial asset. Having argued below that his interest was substantial enough to merit preliminary injunctive relief, appellant cannot now convincingly contend that his interest is too insubstantial to pursue.

There are additional reasons why the death knell has not rung in this action. First, the rescissional and injunctive relief which appellant seeks can be obtained as easily by an individual plaintiff as by a class. Below, appellant urged the necessity of injunctive relief (Transcript of oral argument, May 23, 1975, pp. 10, 14-15; A. 120, 124-25). If he obtains it, the mortgage refinancing will be set aside and the lease re-negotiation nullified. The transaction of which appellant complains will be set aside as effectively as if it had been done on behalf of a class, and appellant's participation in the venture will be unchanged -- as long, that is, as the venture itself is able to survive.

Furthermore, even if appellant himself is unwilling to proceed individually, there are other members of the purported class who conceivably could do so. The existence of any one of them is sufficient to preclude this appeal, since "[I]f 'any member of the purported class possesses a cause of action which is viable if brought individually' the death knell of the action has sounded and 'an order of the trial court denying class certification does not constitute an appealable order'". Hooley v. Red Carpet Corp., [1977-1] Trade Reg. Rep. (CCH) ¶61,275 at p. 70,871 (9th Cir. 1977) (quoting Share v. Air Properties G. Inc., 538 F.2d 279 (9th Cir. 1976)). Here, any investor -- one as small as appellant, or one owning a par-

ticipation larger than appellant's $10,000 -- could maintain an individual action.

Finally, it is no impossible burden for appellant to pursue this lawsuit in his individual capacity. All the factual issues relate to the contents of a single document (the April 10 letter) which, with attachments, is only seventeen pages in length. As this Court found in Milberg, supra, where all issues relate to a single document, it may be presumed that a plaintiff is capable of proceeding alone after denial of class action certification.

In sum, appellant has utterly failed to make the showing of "exceptional instances" required to remove this case from the final judgment rule. There is nothing in the record to support invocation of the death knell doctrine. On the contrary, the record reveals that appellant's interest is more than adequate, and that he is fully capable of pursuing this action in his individual capacity.

II

THE ORDER DENYING CLASS ACTION CERTIFICATION WAS NOT AN ABUSE OF DISCRETION

Appellant devotes virtually his entire brief to arguing a general proposition of law which is not in issue -- that a loser in a proxy contest may, in some instances, bring suit on behalf of other holders of securities who voted in favor of the

proposal. Appellant never addresses the real issue on this appeal -- whether in this case, he has met his burden of showing that he is an adequate representative of the purported class (Fed. R. Civ. P. 23(a)(4)), and that his claims are typical of the claims of the class (Fed. R. Civ. P. 23(a)(3)).*

Appellant attacks Judge Owen's brief opinion in vacuo, with no reference whatever to the facts or the record in this case. Instead of dealing with facts, appellant merely takes issue with the abstract ratio of that opinion stated in the broadest possible terms. He argues against the general implications of Judge Owen's dicta, but never shows why Judge Owen's holding is an abuse of discretion as applied to his own status as a purported representative of all participants in Associates. Thus, we need not lock horns with appellant on whether an overwhelming vote of the class in favor of a proposal per se disqualifies a dissenter from representing the class (even assuming that is what Judge Owen said), because that is not the issue which controls this appeal.

In accordance with general principles of review, the decision below must be affirmed unless erroneous, even

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* The courts recognize that these two requirements largely overlap. See, e.g., Mersay v. First Republic Corp., 43 F.R.D. 465 (S.D.N.Y. 1968); 3B J. Moore, Federal Practice ¶23.06-2.

though the appellate court's rationale may differ from that of the court below. J.E. Riley Inv. Co. v. Commissioner, 311 U.S. 55, 59 (1940); Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U.S. 246 (1951). Thus, even if this Court agrees with appellant's theoretical attack on the broad proposition of the decision below, it cannot reverse unless it finds that, even considering the antagonism between plaintiff's objectives and the financial interests of the class, the denial of class action certification was an abuse of discretion. And, as this Court has held, "the judgment of the trial judge should be given the greatest respect and the broadest discretion, particularly if as here, he has canvassed the factual aspect of the litigation." City of New York v. Int'l Pipe & Ceramics Corp., 410 F.2d 295, 298 (2d Cir. 1969); Lipsett v. United States, 359 F.2d 956 (2d Cir. 1966).

Appellant bore the burden below of convincing the court that class certification was appropriate. As Judge Weinfeld stated in Free World Foreign Cars, Inc. v. Alfa Romeo, 55 F.R.D. 26, 29 (S.D.N.Y. 1972), "[t]he machinery of the [class action] Rule, with its attendant expense, should not be brought into play unless initially plaintiff, who has the burden of proof, justifies its application." (Citations omitted.)

Among the items of which a plaintiff must convince the court is that he will be an adequate representative of those he purports to represent and that his claims are typical of their claims. In determining whether plaintiff has met these criteria of Rule 23(a), the court must consider:

> "(1) whether the interests of the named plaintiff are coextensive with the interests of the other members of the proposed class; (2) whether his interests are in any way antagonistic to the interests of the proposed class; and (3) any other facts bearing on the ability of the named party to speak for the proposed class. 3B Moore, Fed. Prac. ¶23.07[1]." duPont v. Perot, 59 F.R.D. 404, 410 (S.D.N.Y. 1973) (footnote omitted).

Since at least Hansberry v. Lee, 311 U.S. 32 (1940), the courts have recognized that they may not assume that a member of a purported class will be an adequate representative of the entire class merely because he asserts a legal right which might be shared by others. Rather, the courts are required to determine whether there is any existing or potential conflict among class members. Carroll v. American Federation of Musicians, 372 F.2d 155, 162 (2d Cir. 1967), vacated on other grounds 391 U.S. 99 (1968). The Court's inquiry into adequacy "should encompass all possible antagonisms between the interests of the representative and those of the class. See United Egg Producers v. Bauer International Corp., 312 F. Supp. 319 (S.D.N.Y. 1970); Sanders v. John Nuveen & Co., Inc., 463 F.2d 1075 (7th Cir. 1972) [cert. denied 409 U.S. 1009 (1972)]; Maynard, Merel & Co. v. Carcioppolo, 51 F.R.D. 273 (S.D.N.Y. 1970); Free World Foreign Cars, Inc. v. Alfa Romeo, 55 F.R.D. 26 (S.D.N.Y. 1972)." duPont v. Wyly, 61 F.R.D. 615 (D. Del. 1973). Unless plaintiff carries his burden of persuading the court that

no actual or potential antagonism may exist, the requirements of the Rule are not satisfied, and class action certification should be denied. Burns v. United States Postal Service, 380 F. Supp. 623, 629 (S.D.N.Y. 1974); Free World Foreign Cars v. Alfa Romeo, supra; 3B J. Moore, Federal Practice, ¶23.07.

These requirements are supplemented in the Southern District of New York by Civil Rule 11A(b)(a)(iii), which requires a plaintiff to set forth in his complaint factual averments constituting "the basis upon which it is claimed that the party asserting the claim will fairly and adequately protect the interests of the class...." The complaint herein contains no such averments.

In the case at bar, the district court determined, after examining the record, that appellant had not carried his burden of demonstrating that he is an adequate representative of the purported class. There is ample support in the record for this finding.

The court below noted, in dismissing appellant's federal registration and fraud claims, that "plaintiff has not offered any significant support for his allegations" that the April 10 letter was improper (Mem. and Order, May 13, 1976, p. 12; A. 178). That letter, in essence, presented the participants with a choice: they could make an effort, through refinancing and lease modification, to restore the Fisk Building to long-term profitability, while foregoing some current income on their

investments; or they could continue to receive a higher immediate return, regardless of the risk to the long-term viability of the venture. Appellant apparently disbelieved the clear statement of FBA's intention to terminate the lease and preferred to take the risk. The vast majority of participants felt otherwise, rejecting or disregarding appellant's unique interpretation of the April 10 letter. Appellant now seeks, by means of a class action on behalf of those who disagreed with him, to overturn the vote and force all of the investors to incur the risk he personally prefers.

While appellant judges the program of lease modification and mortgage refinancing to be unwise, defendants and 88% of the voting participants favored it. While appellant contends that the Fisk Building venture could somehow survive financially without the new program outlined in the April 10 letter, he never explains how. While claiming that the interests of the class would best be served by rescinding the entire transaction, appellant offers no alternative program to rescue the troubled venture. He seeks only to undo what has been done, but proposes nothing in its place to protect the interests of the investors he claims to represent. Finally, while appellant apparently seeks to infer some improper activity in the involvement of Harry Hemlsley, Lawrence Wien and the law firm of Wien, Lane & Malkin in the venture, it was their connection with the project upon which the investors have relied from the outset (Wien Aff., ¶7; A. 24-25).

It was thus well within the court's discretion to conclude that appellant's suit, if successful, would jeopardize the continued viability of the venture, to the substantial detriment of the vast majority of investors who hoped to restore the building to profitability. The uncontradicted facts in the record show that, if appellant prevails, FBA will terminate its lease with Associates (Wien Aff. ¶¶18(e), 23(a); A. 31, 34-35); that the participants will therefore lose the insulation from liability and uninsured risks entailed in the operation of the building (Wien Aff. ¶23(c); A. 35); that Associates would be unable to satisfy the mortgage, and participants would thus be subject to capital calls (Wien Aff. ¶23(d); A. 35); and that the entire venture might fail (Wien Aff. ¶25; A. 36). The detriment to the participants under such circumstances is immediately apparent. That risk of detriment creates precisely the kind of antagonism between plaintiff's objectives and the interests of the class which, in the cases cited above, has prevented class action certification in the past.

It is possible, though the opinions of the district court make it appear unlikely, that appellant will win his case and invalidate the efforts taken so far to revitalize the Fisk Building venture. But there is no basis in the record for concluding that appellant will thereby advance the financial interests of those he seeks to represent. Rather, the only possible conclusion is that appellant's victory would work to their detriment.

Such potential conflict between a plaintiff's litigation goals and the economic interests of the class is sufficient basis for denial of a motion for certification. As this Court stated in Carroll v. American Federation of Musicians, supra, at 162,

> "Since all members of the class are to be bound by the judgment, diverse and potentially conflicting interests within the class are incompatible with the maintenance of a true class action."

duPont v. Perot, 59 F.R.D. 404 (S.D.N.Y. 1973), cited by the court below, is precisely on point. There, a partner in an investment firm brought a purported class action on behalf of all contributors of capital to the firm, alleging breach of fiduciary duty and common-law fraud in connection with financial arrangements undertaken to alleviate the firms' grave financial difficulties. There, as here, 90% of the investors had already agreed to the arrangements to save the firm which plaintiff challenged. There, as here, the district court recognized that, if successful, plaintiff would jeopardize the interests of the other investors on whose behalf he purported to sue. In denying class action certification, Judge Tenney took particular note of the fact that

> "over 90% of the proposed class have chosen the manner in which they desire to be compensated for their capital contributions and, therefore, that plaintiff's suit seeks to undo their expressed will." 59 F.R.D. at 410.

The court went on to say:

> "[T]his Court must consider not only actual conflicts of interest between plaintiff and his purported class, but also the potential conflicts arising from the litigation. See, e.g., Free World Cars, Inc. v. Alfa Romeo, 55 F.R.D. 26, 29 (S.D.N.Y. 1972). In making that assessment, it requires no stretch of the imagination to find that the potential for conflict of interest in the maintenance of this suit, between plaintiff and those who felt they had salvaged something from what seemed to be a hopeless situation and who had immunized themselves from staggering liability, is of a high order of magnitude. Id. at 411.

Appellant's effort to distinguish duPont (Brief for Appellant, p. 11) on the ground that most of the proposed class therein had signed releases, demonstrates his misunderstanding of both that case and this one. For it was precisely because plaintiff in duPont sought to set aside the expressed will of the vast majority of the purported class, and thereby threatened the value of their entire investment, that certification was denied. The same reasoning supports the decision of the district court herein.

Similarly, in Burns v. United States Postal Service, 380 F. Supp. 623 (S.D.N.Y. 1974), and Sheridan v. Liquor Salesmen's Union, 60 F.R.D. 48 (S.D.N.Y. 1973), the court denied class action certification where it concluded that members of the purported class probably agreed with defendants' actions which gave rise to the suits. See also Free World Foreign Cars, Inc. v. Alfa Romeo, 55 F.R.D. 26 (S.D.N.Y. 1972).

Appellant would have this Court believe that, despite his citation of duPont and Free World Foreign Cars, Judge Owen held that a plaintiff may never represent a class which includes shareholders who didn't vote as he did, such as in a proxy fight for corporate control or a management proposal for a change in capital structure. In light of his reliance on those cases, it is clear that Judge Owen meant to limit his holding to circumstances where, as here, there is antagonism between plaintiff and the class because plaintiff's litigation objectives threaten the entire value of the class' investment.

It was also appropriate for the court below to consider appellant's failure to show that, in the nineteen months between the institution of this action and the determination of the motion for certification, there was a single other participant who expressed any sympathy for this lawsuit. As Judge Mansfield noted in denying class action certification in Guttmann v. Braemer, 51 F.R.D. 537 (S.D.N.Y. 1970), such lack of interest by those whose claims plaintiff contends are the same as his supports the conclusion that plaintiff is not an adequate class representative. Accord, Sheridan v. Liquor Salesmen's Union, supra.

Finally, the court below was entitled to recognize that the potential for conflict among purported class members is particularly high where, as here, appellant seeks to enjoin or rescind a transaction. Indeed, Judge Tenney in duPont considered that fact alone sufficient to justify denial of certification:

> "If the successful prosecution of this action necessitated rescission of the March agreement, this Court would end its inquiry at this point. [Citations]. Since rescission would undoubtedly lead to the withdrawal of [defendant's] funds and, thus, the liquidation of [the venture], it can safely be presumed that such a course of action would not be co-extensive or compatible with the interests of many of the proposed class." duPont v. Perot, supra, at 410.

See also, Maynard, Merel & Co. v. Carcioppolo, 51 F.R.D. 273 (S.D.N.Y. 1970), in which Judge Mansfield discussed the high potential for conflict among putative class members where the named plaintiff seeks relief which might not be satisfactory to others. In such circumstances, Judge Mansfield stated in denying the motion for certification, the named plaintiff is unlikely to protect the interests of the entire class. Accord, Guttmann v. Braemer, 51 F.R.D. 537 (S.D.N.Y. 1970).

Here, as in duPont, the record shows that rescission of the refinancing and lease modification "would undoubtedly lead to" FBA's cancellation of the lease and then, almost inevitably, to the ruination of a venture which had been successful for over twenty years. The vast majority of participants have chosen to forgo some current income in favor of a program designed to avoid that risk and restore the Fisk Building to its former profitability. Appellant, evidently preferring a different, but unspecified, course of action, specifically seeks to enjoin or rescind that very program. In such circumstances, appellant may be much less willing than are other participants to accept

a cash settlement, and much more willing to jeopardize the long-time viability of the venture in favor of his own peculiar investment objectives. Such considerations weigh heavily against class action certification. Maynard, Merel & Co. v. Carcioppolo, supra.

In the face of this ample support for the denial of class action certification, appellant has made no showing, either in this Court or below, to carry his burden of establishing his adequacy as a class representative. He has neither complied with the local Rule requiring him to set forth the factual basis of his claim nor addressed the factual issues of the adequacy of his representation and the typicality of his claims. All that appears in the record justifies the conclusion that appellant is not an adequate or typical representative of the participants in Associates. Therefore, the order of the court below denying class action certification should be affirmed.

CONCLUSION

For the reasons set forth herein, appellant's appeal from the interlocutory order of the district court denying class action certification should be dismissed.

If this court reaches the merits of this appeal, the

order of the district court should be affirmed.

Respectfully submitted,

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Dated: March 11, 1977

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4/8/77